IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1962 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DOLATSINH RUPSINH ZALA

Versus

DISTRICT EDUCATION OFFICER

Appearance:

1. Special Civil Application No. 1962 of 1999

MR KB PUJARA for Petitioner No. 1

MR ND GOHIL, AGP for Respondent No. 1,3,5

MR RR MARSHALL for Respondent No. 2

RULE SERVED BY DS for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 09/10/2003

ORAL JUDGEMENT

Heard learned advocate Mr. K.B.Pujara for petitioner, learned AGP Mr. N.D.Gohil appearing on

behalf of respondent Nos. 1, 3 & 5 and learned advocate Mr. R.R.Marshall appearing on behalf of respondent No.2. Though the notice of rule has been served to the respondent No.4 no appearance is filed on his behalf before this Court. Mr. K.B.Pujara has, however, pointed out that respondent No.4 is a formal party. The matter is, therefore taken up for hearing even in absence of respondent No.4.

2. In the present petition petitioner has challenged the order passed by the Gujarat Secondary Education Tribunal, Ahmedabad in Application No. 88 of 1997 wherein the application which was filed by the petitioner has been rejected by the Tribunal. However, it was kept open for the District Education Officer to absorb the applicant means the present petitioner in any other school as Assistant Teacher with protection of last pay drawn by the applicant.

3. At the time of issuing rule, this Court has passed an order on 19.3.1999 which is quoted as under:

> "Rule. Notice as to interim relief returnable on 16.4.1999. Learned advocate Mr. Pujara appearing for the petitioner states that the post of Head Master at Sheth P&R High School Pratij is still vacant and no regular appointment of Head Master has yet been made. It is, therefore, directed that the respondents herein shall permit the petitioner to assume the charge of the post of Head Master of Sheth P & R High School, Pratij, forthwith. D.S. is permitted."

Thereafter the interim relief continued and according to the learned advocate Mr. Pujara the petitioner is working with the same school as absorbed by the said school on the post of Head Master. Mr. Pujara also submitted that affidavit-in-reply is filed by respondent No.2 wherein it is mentioned that District Education Officer has passed an order on 3.2.1997 and directed to the school authority to allow the petitioner to join duties. Accordingly, respondent No.2 school authority has allowed the petitioner to join duties on 6.2.1997. However, according to the school authority the Incharge Head Master Mr. K.T.Modi approached the Gujarat Secondary Tribunal by way of application No. 68 of 1997 and the present petitioner also approached the said Tribunal by way of application No. 88 of 1997. The Tribunal has passed the order in the said application as stated in the petition. Thereafter, because of interim order dated 19.3.1999 passed by this Court which was

served upon respondent No.2 on 20.3.1999 and in compliance of the said order the petitioner was allowed to assume charge of the post of Head Master of Sheth P & R High School, Prantij on 20.3.1999. Since then petitioner has been functioning as such. According to respondent No.2 the Incharge Head Master K.T.Modi who has retired on 31.5.1998 on attaining the age of superannuation, therefore, in pursuance of the interim order passed by this Court on 19.3.1999, the Incharge Head Master has handed over the charge of Head Master to the petitioner on 20.3.1999. The post of Head Master substantially fell vacant on 31.10.1994. The respondent No.2 school has not filled up the post of Head Master by following the procedure prescribed under Section 35 of the Gujarat Secondary Education Act, 1972 but as per the direction of the District Education Officer, the petitioner has been ordered to be absorbed on the said post. There is no reply filed on behalf of District Education Officer and other respondents. In light of these facts, learned advocate Mr. Pujara has submitted that according to the Government Resolution dated 6.7.1998, the Head Master also if declared surplus is entitled the protection being a surplus Head Master. This fact has been made clear in the Resolution by the State Government that if any Head Master, Teacher or employee who has been appointed up to 30.6.1998 and declared surplus, he is entitled to get protection as a surplus Teacher and he will be entitled the benefit of the surplus Teacher. This Resolution is applicable to the Secondary and Higher Secondary Schools. Therefore, Mr. Pujara has submitted that Head Master is covered by the said Resolution and the Head Master is also entitled the benefit of surplus Teacher which has been granted in favour of Head Master, Teacher and employee by the State. Mr. Pujara has also pointed out that present petitioner was appointed prior to 30.6.1998 and therefore, he is squarely covered by the said Resolution and entitled the benefit upon that. He also pointed out that the order passed by the District Education Officer which is at page 21 in favour of the petitioner with a direction to the school authority respondent No.2 to absorb the present petitioner as Head Master and he is entitled the benefit of being a surplus Head Master. On that basis, for enforcement of the said order passed by the District Education Officer, Sabarkantha at Himmatnager dated 3.2.1997 application is filed by the petitioner before the Tribunal, the Tribunal has rejected the said application and come to the conclusion that Head Master is not entitled the benefit of surplus Teacher as his post is required to be filled up being a selection post as per the provisions prescribed under Section 35 of the

Act. I have perused the order passed by the Tribunal in Application No. 88 of 1997 dated 3.3.1999. In para 9, the following observation is made by the Tribunal:

> "From the above discussions, in my view, the post of H.M. cannot be filled in by absorbing a surplus H.M. from another school but the said post being a selection post has to be filled up in accordance with the provisions prescribed U/s. 35 of the Act. In the instant case, therefore, as the D.E.O. has sought to absorb the applicant in the respondent school as H.M. the said action is contrary to the provisions of section 35."

4. The said observations which have been made by the Tribunal to the effect that the post of the Head Master cannot be absorbed being a surplus Head Master from another school but the said post being a selection post has to be filled up in accordance with the provisions prescribed under Section 35 of the Act. The said observation is contrary to the Government Resolution dated 6.7.1998. Though this Government Resolution has been brought to the notice of the Tribunal and the Tribunal has considered that this being erroneous Government Resolution issued by the Government. It is necessary to consider one important aspect that ultimately, for the post of Head Master a senior Teacher is eligible as per the provisions of the Act. Section 35 provides selection of both Teacher as well as Head Master. If the criteria is applied for the post of Head Master it will be also applicable to the post of Teacher. If the Teacher is getting benefit of surplus Teacher as per Government Policy then why the Head Master should not, for that no reason is given by the Tribunal and therefore, according to my opinion even the finding given by the Tribunal is itself erroneous and contrary to the policy laid down by the State Government in Government Resolution dated 6.7.1998 and is also contrary to the scheme of Section 35 of the Act. Therefore, the said order passed by the Tribunal dated 3.3.1999 is required to be quashed and set aside.

5. In the result, present petition is allowed and the order passed by the Tribunal in application No. 88 of 1997 dated 3.3.1999 is hereby quashed and set aside. It is however, made clear that this order has been passed by this Court considering the special facts and circumstances of the case because in view of the interim order passed by this Court on 19.3.1999 the petitioner is already appointed by respondent No.2 School and he is working happily and Mr. Marshal is not able to point out

any grievance against the absorption of the petitioner and his working, therefore this may not be considered as a precedent in other cases. Rule is made absolute accordingly.

(H.K.Rathod,J)

Jayanti*